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IN THE

Supreme Court of the United States

October Term, 1982

GEORGE D. BUSBEE, ET AL.,
Appellants,

vs.

WILLIAM FRENCH SMITH, ET AL.,
Appellees,

and

WILLIAM C. (BILLY) RANDALL, JR., ET AL.,
Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether Georgia's 1981 Congressional reapportionment, found by the Three-Judge Court to be the product of intentional racial discrimination and "designed to minimize black voting strength to the extent possible," was properly denied preclearance under Section 5 of the Voting Rights Act of 1965?

2. Whether in the absence of any showing that its 1981 Congressional reapportionment provided blacks equal access to the political process, the State of Georgia was not entitled to preclearance under the "effect test" of Section 5, as amended in 1982?

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MOTION TO AFFIRM

Intervenor-Appellees, pursuant to Rule 16, hereby move that the judgment of the United States District Court for the District of Columbia be affirmed on the grounds that the evidence of racially motivated action by the Appellants was overwhelming, that the issues raised by the Appellants are frivolous, and that the questions are so insubstantial that argument is unwarranted.

STATEMENT OF THE CASE

Proceedings Below

On March 8, 1982, the State of Georgia and various of its officials (Appellants) filed an action in the United States District Court for the District of Columbia seeking Section 5 approval of Georgia's 1981 Congressional reapportionment plan. Immediately

thereafter, Intervenors filed a Petition to Intervene, which was granted pursuant to Rule 24, Fed.R.Civ.P. Intervenors are a group of 21 black registered voters who reside in the State of Georgia, including 18 black members of the House and Senate of the Georgia General Assembly.

On May 3, 1982, the Attorney General of Georgia advised the State to proceed with elections under Act No. 5, notwithstanding the the fact that it had not been approved under Section 5 of the Voting Rights Act of 1965. The Intervenors and the United States filed motions to enjoin the State from implementing Act No. 5, and the three-judge court enjoined the State from proceeding on May 24, 1982. On May 25, 1982, the State applied for a stay of that order to the Circuit Justice, the Honorable Chief Justice Warren E. Burger. Chief

Justice Burger denied the State's application. The State next applied for a stay to the Honorable William H. Rehnquist, who also denied the application. (J.S.A.2)

Trial on the merits was held before the three-judge court from June 28 through July 1, 1982. In addition to the live evidence at trial, the parties introduced voluminous deposition testimony of more than 30 witnesses. The district court denied pre-clearance by order of July 22, 1982, and a stay of that order was denied by the Honorable William J. Brennan, Jr., and the Honorable John P. Stevens.

The Georgia General Assembly then enacted a new reapportionment plan that did not split the black community in the Atlanta area, and this plan was then approved under Section 5 with the consent of the Intervenors and the United States. In this appeal, the State continues to seek approval of the original Act No. 5.

The Facts

1. Background. During the 1981 Special Session, the Georgia Senate passed a bill that kept intact the cohesive black community in metropolitan Atlanta, which is contained in both Fulton and DeKalb Counties. This plan created a Fifth Congressional District that was 69% black by population. (J.S.A. 19-24) The House of Representatives, however, passed a bill that split the black community into three separate Congressional districts, the Fourth, the Fifth, and the Sixth. Under the House bill, the total black population in the Fifth Congressional District was only 51.7%.

A conference committee was convened to resolve the difference between the House and Senate concerning the percentage of blacks in the Fifth District. The General Assembly ultimately passed a reapportionment plan with a Fifth Congressional District that

contained a black population of 57% (J.S.A. 36-40), pursuant to a conference committee report.

Although nominally a majority black district, the Fifth Congressional District in Act No. 5 contained a majority of whites based on the voting population. Whites were 54% of the registered voters (J.S.A. 3) and nearly 60% of the actual voters. (T. 680-81)

The State of Georgia submitted its congressional reapportionment plan administratively to the Attorney General, who interposed an objection to Act No. 5 because the State had apparently divided the black community in Atlanta in order to minimize the possibility of electing a black Congressman. (J.Ex. 25, p. 3).

2. The Historical Opposition to Black Voting Strength in Atlanta's Fifth Congressional District. Since the white primary was abolished in Georgia following

this Court's decision in Smith v. Allwright, 321 U.S. 649 (1944), the State of Georgia and its agents have engaged in a pattern of continued opposition to the voting strength of blacks in Atlanta's Fifth Congressional District. The Democratic Party instituted a county unit vote after the white primary was struck down. Under this system, two adjoining counties that were dominated by white voters were joined with Fulton County in one congressional district. The two additional counties were given more county unit votes than Fulton County even though their population was slight by comparison. (T. 661-63). The county unit system negated the black vote in Fulton County, and it was adopted for the specific purpose of discriminating against black voters in the Atlanta metropolitan area. (T. 661-62).

After the elimination of the county unit system, the districts were malapportioned

to continue the "dilution" of black voters in the Atlanta area. That malapportionment was not eliminated until this Court's decision in Wesberry v. Sanders, 376 U.S. 1 (1964).

With the advent of one person, one vote, and the reapportionments necessitated by that rule, State legislators were preoccupied with efforts to minimize the ability of blacks to participate in the political process in the Atlanta area. (T. 668-72). When congressional reapportionment occurred in 1971, race was the overt issue insofar as the Fifth Congressional District was concerned. (Ex. I.D. HHH, III, JJJ, KKK, LLL, NNN, OOO, PPP, QQQ, RRR, SSS). The General Assembly intentionally drew the Fifth Congressional District to exclude Andrew Young and other prominent blacks from the district, and also split the black community among three congressional districts

(the Fourth, Fifth and Sixth) in order to minimize the black percentage in the Fifth District. (T. 133; Andrew Young Dep. 29-31; J. Ex. 1). This plan was then objected to by the Attorney General when submitted under Section 5. The General Assembly revised the Congressional reapportionment by restoring some of the black areas to the Fifth District, including Andrew Young's residence. Although the Attorney General then precleared the revised legislation, some of the black areas that had been removed from the Fifth District for invidious purposes remained outside that district. (T. 674).

In the 1970 Congressional reapportionment, Julian Bond--then a State Representative, now a State Senator and Intervenor--was a focus of racist opposition to a blacker Fifth Congressional District.

Whites who opposed more blacks in the Fifth District in the 1971 and 1972 sessions used the "Julian Bond argument" to bring support to their position. They argued that raising the black percentage was an effort to get Bond in Congress, and this was an effective racially motivated tactic. (T. 675; Exhibits I.D. HHH, JJJ, KKK, LLL).

3. Congressional Reapportionment in the Georgia Senate, 1981. In the Senate, three individuals were active in trying to create a congressional reapportionment plan that would allow a black candidate a fair opportunity to be elected to Congress, Senators Julian Bond, Paul Coverdell, and Majority Leader, Thomas Allgood. Senator Coverdell, who is a white Republican, was opposed to the present Fourth and Fifth Congressional districts "because they prevent two large and cohesive communities

in this area from expressing their political views;" these two communities were the "black community in Atlanta, Fulton County and DeKalb County and the white suburban community in Fulton and DeKalb Counties." (Nalls Dep. 84).

Senator Allgood, with the tremendous power that inheres in his position as Majority Leader, provided the political clout that enabled what became known as "the Bond Plan" to pass in the Senate. Allgood had assumed "all along that any plan for Congressional reapportionment would take [the increased black population in South Fulton and South DeKalb Counties] into consideration because anyone who's familiar with Atlanta and DeKalb County is aware of the fact that those areas have become far more substantially black in the past ten years than they were before." (Allgood Dep. 13-16). Senator Allgood

testified that the other plans being considered did not give a black a reasonable chance of being elected, that "a black had a very remote possibility of being elected" in the Fifth District contained in Act No. 5, that the House had drawn a plan "for the purpose of reducing minority population," that the House's plan was "flagrantly discriminatory," and that some senators would face opposition in their home districts because they favored the Bond Plan. (Allgood Dep. 16, 21-23, 25, 30, 35-36, 44-45) The Bond Plan created a 69% black Fifth Congressional District, and it sought to group together areas with similar socio-economic considerations, similar neighborhoods, and to group people together on the basis of their "community of interests." (Id. 31-34; J.S.A. 20)

The Senate ultimately passed the Bond amendment, and Senate conferees were

appointed to try to resolve the differences between the Senate and House plans, the latter of which provided only a 51% black Fifth District. Of the three conferees from the Senate, Perry Hudson, Terrell Starr, and Culver Kidd, two were adamantly opposed to the Bond Plan. (J.S.A. 32-33). As Senator Hudson admitted, "I would like to make it very plain that I did not like Julian Bond's plan at that stage of the game. . . ." (Hudson Dep. 164) Hudson did not support any 65% black Congressional district. (Hudson Dep. 259, 261-262)

The second Senate conferee, Terrell Starr, opposed the Bond Plan even though he admitted that the common interests of the people were important when it came to drawing congressional lines for other districts. (Starr Dep. 121-23) He did not support creating 65% black congressional districts. (Starr Dep. 120) Senators Starr

and Hudson opposed the Bond Plan because it created an opportunity to elect a black to Congress. (J.S.A. 21)

The third Senate conferee, Culver Kidd, supported the Bond amendment because of his "feeling" that it was "right" and was "the reasonable, fair way to draw those lines according to the percentages of minority groups." (Kidd Dep. 14)

All six conferees, House and Senate, focused on only one criterion, and that was the racial percentage in the Fifth District. (Kidd Dep. at 19-21, 39-40, 42-43) The conferees other than Senator Kidd mentioned that a higher black percentage could result in electing a black congressman, and they were opposed to that. (Id.) The Senate's 69% black Fifth District plan was not taken seriously during the conference committee meetings. (Nall Dep. 136-137)

Senator Kidd testified that the House conferees were dominated by Joe Mack Wilson (Kidd Dep. 17-19, 30-31), and that the House conferees set an absolute maximum of a 57% black district above which they would not go. (Id. 19, 40) The Senate conferees reported to Majority Leader Allgood that the House would not agree to create a congressional district in which a black could win. (Allgood Dep. 38)

Ultimately, five conference reports were defeated in the House, Senate or both, before a sixth conference report was finally passed, thus becoming Act No. 5. Majority Leader Allgood had found it increasingly difficult to maintain a Senate vote in favor of a higher black percentage district as the conference process continued. Senators feared being perceived as supporting the election of a black congressperson from Georgia. They were worried that this would

hurt them in their home districts. Senators told Allgood that, "I don't want to have to go home and explain why I was the leader in getting a black elected to the United States Congress." (Allgood Dep. 42-43, 44-45) (J.S.A. 40)

Some members of the Senate stated that if Georgia had to have a majority black Fifth Congressional District, it was better to have it forced upon them by the Justice Department rather than do it voluntarily. (Allgood Dep. 58-59)

4. Reapportionment in the House of Representatives, 1981. The Georgia House is under the autocratic control of the Speaker, Tom Murphy, and a small group referred to as "the Leadership." (Elliott Dep. 9-15) In the case of reapportionment, the House was under the control of Joe Mack Wilson, the Chairman of the House Reapportionment Committee. Wilson was in "total

command" of the reapportionment process. (Randall Dep. 80)

Representative Wilson exercised tremendous control over the other members in the House by threatening to gerrymander them out of their districts if they did not go along with his desires. Representative Elliott testified that: "It was generally perceived that if a member did not go along with the particular plan desired by the Democratic leadership, that member's own House district might be in jeopardy." (Elliott Dep. 25, 57-58) The Members were afraid not only that their own House districts would be modified, but that their area would be moved to an undesirable Congressional district as punishment. (Elliott Dep. 58-59; Phillips Dep. 13)

Representative Phillips from Gwinnett County testified that Wilson told him:

> On several occasions the Gwinnett delegation was threatened with having our county split if we did not support a certain measure, whatever that measure might be on the floor of the House at that time. (Phillips Dep. 13)

Some of the conference committee reports were specifically designed to manipulate the congressional districts in which certain representatives lived in an effort to intimidate them to vote for Joe Mack Wilson's position. As Phillips testified:

> [These conference reports were] nothing more than an effort to show some of the members of the House that the Conference Committee could do whatever they well pleased and that if they didn't get cooperative with the Conference Committee they might wind up in a Congressional district which they did not like. (Phillips Dep. 20-21)

Representative Vinson Wall, who was the Secretary of the House Reapportionment Committee, testified that Wilson had complete control over the process, and that "the Committee did not buck the Chairman as such." Wilson

never lost a vote in the Committee. (Wall Dep. 9-10) Wall testified that:

> [Y]ou didn't do anything in that Committee so far as presenting plans unless it had, basically, his [Wilson's] okay. That goes to House plans, our own House of Representatives' plans, as well as the Congressional. You know, if you don't have his approval, it's not going to fly. (Wall Dep. 8-9)

When reapportionment bills reached the House floor, Wilson served as "the floor manager of all the reapportionment bills;" the House would normally "uphold the floor manager's position;" people were "afraid to buck him;" and they were afraid "if they bucked him, they knew that in all likelihood they would have problems with their own districts." (Wall Dep. 11-12) The problem would be that they would have their own districts "drawn in a way that you can't survive politically." Wilson would see that "the district would be divided or put into

areas that were completely new territory to some people." (Id. 11-12)

In one instance, Representative Scott, who is black, was going to introduce a plan, and Joe Mack Wilson said to Wall, "[h]ow did those damn niggers get that plan?" (Phillips Dep. 111-12)

5. General Evidence of Racial Motivations in Act No.5. Racism is pervasive in the Georgia General Assembly. The terms "nigger" and "black" are used synonymously in the House. (Lowe Dep. 31; Phillips Dep. 35-36; Wall Dep. 41-42; Elliott Dep. 54) Legislation that might benefit blacks is usually referred to as "nigger legislation," or "nigger bills." (Wall Dep. 31-32)

Representative Phillips testified that legislation in the House "has been represented as being a nigger bill or nigger legislation," and that this would include legislation dealing with "social issues, voting

legislation, voting registration type things, legislation dealing with health issues, welfare, for example, Grady Hospital, welfare payments, AFDC type things." (Phillips Dep. 36) Representative Phillips also testified, "[t]hat's the general consensus of the House, a lot of the members of the House." (Phillips Dep. 101)

Much evidence of racism in the legislature focused on Representative Joe Mack Wilson since he was the man who controlled the House of Representatives and thwarted the creation of a Fifth Congressional District with a majority of black voters. Joe Mack Wilson was roundly described as a racist by both whites and blacks. (Nalls Dep. 11, 90-91; Phillips Dep. 34-35; Wall Dep. 19, Vol. II, 57-59, 60, 95; Elliott Dep. 50-51; Holmes Dep. 45-46, 49) The district court agreed. (J.S.A. 7-8)

Chairman Wilson openly stated his prejudice to a member of the House Reapportionment Committee.

> Q. What informal greeting did [Wilson] give you when he joined the Committee?
>
> A. He said that if there was anything he hated worse than blacks and he didn't use the word blacks, he said it was Republicans.
>
> Q. What was the word he used?
>
> A. Niggers. (Felton Dep. 14)

Representative Felton testified that there was extensive racially motivated resistance to black state legislative districts in the Atlanta metropolitan area. (Felton Dep. 24-25)

There were "legislators who would prefer not to have as many blacks" elected to office; they "were not interested in drawing additional black seats;" and one of the three House conferees, John Godbee, told her that he knew that it took "65

percent black to elect a black" in the Fifth District. Godbee also said that the proposed district would probably not "be approved by the Justice Department," but that "it would be better politically if we were forced to draw a black district than for us to voluntarily go back and let it be known that we were on a Conference Committee or that even our other colleagues in the House voted for a district to seat a black." (Felton Dep. 24-25a, 35) Rep. Felton testified that the 69% black Fifth District plan was rejected in order to not "draw a black district, I'm sure of that. There was no really other concern." (Id. 37)

Chairman Wilson barely denied his racist views. He admitted to the use of the word "nigger."

Q. What do you mean by that when you use it?

A. How do I use it?

Q. Yes.

A. Never in any ugly sort of way to put down you or any black man by calling him a nigger. I hear them calling each other the same thing. Now, what they mean by it to each other, I don't know, but to me it's just another expression for a black man.

Q. You could use black, Negro, colored, or nigger interchangably, then?

A. Yes.

* * * *

Q. And you would use them in pretty much the same way, wouldn't you?

A. I never use the word "nigger" that I wasn't smiling or use it in a way that had no hatred or anything in my heart. Y'all have been trying to pin it on me here for a few days, but that's not a part of my make-up.

(Wilson Dep. 660-661)

Representative Lowe, who is white, testified that Joe Jack Wilson would not create any black districts that he was not compelled to do by law. (Lowe Dep. 28)

Chairman Wilson made such comments on the floor of the House when discussing Congressional reapportionment. He made a similar comment to Representative Lowe on another occasion concerning reapportionment of the House of Representatives. (Lowe Dep. 29).

Representative Lowe further testified that there was "a concern among whites in the Legislature about blacks in Fulton County-DeKalb area achieving power," that members of the General Assembly "did not want to draw an equitable number of black districts," and that Chairman Wilson normally referred to blacks as niggers. (Lowe Dep. 33-34) Representative Lowe testified that, after the Justice Department had objected to the Congressional plan, Chairman Joe Mack Wilson stated to her that "he did not intend to draw amy more black districts or

Republican districts than he had to."

(Lowe Dep. 35-36) Wilson also stated to Lowe:

> I'm not going to draw a honky Republican district and I'm not going to draw a nigger district if I can help it.
> (Lowe Dep. 36)

Representative Lowe further testified that "the majority of the members on the floor [of the House] did not want to draw a black Fifth District," that they wanted to keep the Fifth District "as white as possible," and they wanted "to keep the percentage [of blacks] as low as possible." (Lowe Dep. 50-51)

Representative Wall testified that the Bond Plan was perceived in the House as the kind of "nigger legislation" that spells defeat.

> Q. Was the effort to increase the representation of blacks in the Fifth Congressional District perceived as nigger legislation as a matter of fact, Rep. Wall?
> . . . .
>
> A. It was. It was view[ed] primarily as an effort to put

Julian Bond in the U.S. Congress and most of those members of the House were not going to have any part of doing that or be a party to doing that.

Q. Putting Julian Bond in the Congress?

A. Yes, since it was his plan.

Q. Is this the kind of legislation that you testified about where somebody could be hurt in a district if they are perceived as supporting it?

A. Right. (Wall Dep. 33)

Representative Wall further testified that the basis for the opposition was the possibility of electing a black. (Wall Dep. 34-35)

Wall was also present when Joe Mack Wilson learned that Representative Phillips was presenting a plan to the House during the time when the Conference Committees were meeting. Phillips' plan would have created a 60% black district, and would have kept Gwinnett County intact. Wall testified that the representatives from the

Gwinnett delegation were standing at their desks discussing the motion, that Joe Mack Wilson came onto the House floor, saw whose name was on the plan, and came "charging down the center aisle and wanted to know what in the hell was going on." (Wall Dep. 28) Phillips told Chairman Wilson what he was doing, and then:

> [A]t that point, he just blew up, Joe Mack blew up and got mad and ferocious and more or less said to Tom, he said, we're going to get you goddamn Republicans and then we're going to fix the niggers. (Wall Dep. 28)

Senator Floyd Hudgins testified that Joe Mack Wilson said to him:

> Well, Floyd, I don't know what we can do or what's going to be the outcome of this because the Justice Department is trying to make us draw nigger districts and I don't want to draw any nigger districts. (Hudgins Dep. 7-8) (J.S.A. 9)

Senator Hudgins further testified:

> We said "What's going to happen?" [Wilson] said, "I don't know, but

> I'm not for drawing nigger districts and I'm not for drawing a Republican district. . . ."
>
> I asked him how come he didn't just draw a district that gave the blacks in Georgia the majority of the people so that they could elect a black representative; that they had ten seats and the blacks were 30% of the population. It looked to me like one out of ten wouldn't be bad.
>
> He said he wasn't for that; that wasn't going to happen or something of that nature. . . .
> (Hudgins Dep. 11-12) (J.S.A. 35)

Representative Holmes also testified that he overheard a white DeKalb legislator, Ken Workman, comment in connection with a Fifth District plan:

> I'm not going to support this plan that will, you know, provide that high percentage of niggers in this district, in this Congressional district. (Holmes Dep. 36)

Intervenor William Randall testified that the Bond Plan would have no chance of passage in the House because:

> [The political reality] is that it would have given the blacks an equal chance, an equal chance of being elected from the Fifth, and I don't think that was the desire of the majority of the members of the House of Representatives. (Randall Dep. 26)

Randall further testified that the opposition to the Bond Plan was "racially motivated" in the House; that the House members were opposed to allowing districts "to be drafted in such a manner to afford a black an opportunity to get elected;" and that he heard conversations to the effect that "it would be Julian Bond's district if he would run for it." (Randall Dep. 53-54)

When the General Assembly finally passed Act No. 5, it was understood by many that their action "was improper under the Voting Rights Act." (Wall Dep. 38) There was a consensus in the House that Act No. 5 would be "thrown out." (Wall Dep., Vol. II, p. 76).

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DENIED THE STATE OF GEORGIA DECLARTORY RELIEF UNDER SECTION 5 BECAUSE OF THE OVERWHELMING EVIDENCE THAT ACT NO. 5 WAS PASSED FOR THE PURPOSE OF MINIMIZING THE CHANCES OF A BLACK CANDIDATE BEING ELECTED TO CONGRESS, AND BECAUSE THE COURT FOUND THAT RACIALLY DISCRIMINATORY PURPOSES WERE THE SOLE REASON THAT EXPLAINED THE BOUNDARY LINE BETWEEN THE FOURTH AND FIFTH DISTRICTS.

The State's argument in this case is a simple one. Georgia contends that it is entitled to prevail--regardless of the actual purposes and motivations that lay behind Act No. 5--because Act. No. 5 did not put black voters in a worse position than they were under the previous law. Absent such a technical "retrogression," the Appellants contend that Section 5 of the Voting Rights Act is completely irrelevant to their actions.

The State's contention is wholly without merit. It ignores the plain language of the statute, the legislative history of the provision, the decisions of this Court, and all of the evidence and findings in this case. Section 5 expressly denies the State the right to implement legislation such as Act No. 5 unless it proves that the legislation "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ." Appellants rely on this Court's decision in Beer v. United States, 435 U.S. 130 (1976), which, under the circumstances of that case, equated the "effect" part of the Section 5 test with "retrogression." But neither Beer nor any other case has ever suggested that the "purpose" test of Section 5 is inapplicable in the absence of retrogression.

Such a construction would render the purpose test completely meaningless.

Accordingly, the sole issue here is whether a state can satisfy Section 5 with a reapportionment scheme where the evidence shows, and a district court finds, that the reapportionment was enacted with the purpose of discriminating on the basis of race. The resolution of the issue should be obvious since this Court has repeatedly held that racially motivated state action is impermissible. Rogers v. Lodge, ___ U.S.___, 102 S. Ct. 3272 (1982); City of Mobile v. Bolden, 446 U.S. 55 (1980).

Indeed, this Court had held, without dissent, that the purpose issue under Section 5 is wholly distinct from the non-retrogression effect test. City of Richmond v. United States, 422 U.S. 358, 378-79 (1975).[1]

1 While Justices Brennan, Douglas and Marshall dissented, they did not disagree with this aspect of the decision.

Where a state acts with the purpose of discriminating on the basis of race, its action is illegal regardless of whether the position of minorities is enhanced, deprecated or merely unchanged. Thus, the annexation at issue in City of Richmond v. United States, supra, achieved a "perfectly legal result," but would still be invalid if it had been undertaken in order to discriminate. 422 U.S. at 378.

> An official action, whether an annexation or otherwise, taken for the purpose of discrimination against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color. Congress surely has the power to prevent such gross racial slurs. . . . An annexation proved to be of this kind and not provided to have a justifiable basis is forbidden by §5, whatever its actual effect may have been or may be. 422 U.S. at 378.

It is frivolous for the State to argue that purposeful discrimination is permissible,

in the context of voting or in any other context, whether under the Constitution or under Section 5.[2] In denying the State of Georgia declaratory relief, the district court properly applied this Court's decisions concerning purposeful discrimination. The court made extensive findings on the voluminous evidence and found that the State of Georgia had a long and continuous

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2 In attempting to find some factual distinction between this case and prior decisions of this Court, Appellants assert that this Court has never invalidated any law, under the Constitution or under Section 5, which actually enhanced the right to vote. To the contrary, however, this Court invalidated in Rogers v. Lodge, supra, an at-large election scheme that, when adopted, enhanced the ability of blacks to participate in the political process. Before at-large voting was adopted Burke County, the county's commissioners had been appointed by the grand jury from which blacks were completely excluded. The adoption of any voting scheme inevitably increased their political impact, but that did not insulate that law from constitutional attack. See, Ga. Laws of 1873, p. 226; Ga. Laws of 1911, p. 390.

history of discriminating against black voters in the Fifth District (J.S.A. 5-7); that the Chairman of the House Reapportionment Committee, Joe Mack Wilson, exercised tremendous control over Act No. 5, that he was a racist, and that he did everything within his power to minimize the possibility of electing a black to Congress from the Fifth District (J.S.A. 8-9, 13-14, 33-39); that various announced, neutral goals were "a pretext for splitting the cohesive black community in the greater Atlanta area of South Fulton and DeKalb Counties" (J.S.A. 12); that blacks were excluded because of their race from the powerful House-Senate conference committees that created Act No. 5 (J.S.A. 28-33); that race was the sole issue that was considered by the legislators in drawing the Fourth and Fifth Congressional Districts (J.S.A. 31, 34, 41); that Act No. 5 made it very unlikely that a black would be

elected to Congress because no district had a majority of black voters and since racially polarized voting prevailed and had actually increased in past years (J.S.A. 3, 5, 9, 16, 37, 40-43); and that the State's two key witnesses at trial, the House and Senate Reapportionment Committee Chairmen Wilson and Hudson, were "discredited as untrustworthy." (J.S.A. 42)

The court concluded that:

> The only reason the Georgia General Assembly failed to enlarge the black population in the Fifth District more than it did and failed to unite black neighborhoods was solely because the population was of the black race.
>
> There was no legitimate, nondiscriminatory reason why the Fifth District was drawn the way it was. (J.S.A. 41)

Based on its conclusion that the evidence "demonstrates no legitimate non-racial reason for adoption of a Fifth District which split a cohesive black community" (J.S.A. 46), and based on vast evidence

of intentional discrimination, the Court concluded that "Act No. 5 as it pertains to the Fourth and Fifth Congressional Districts has a discriminatory purpose in violation of Section 5." (J.S.A. 47)

Appellants do not specifically challenge any finding of fact in this case, nor could they in light of the truly overwhelming evidence of intentional discrimination that was presented to the trial court.

Lacking support in either law or fact, Appellants seeks to obfuscate the issue in the case by claiming that the district court, in effect, required them to "maximize" the percentage of blacks in the Fifth District, and to give blacks an advantage. (J.S. 24-26) To make this argument, the State has to ignore the lower court's explicit holding:

> The Court's decision does not require the State of Georgia to maximize minority voting strength in the Atlanta area. . . . The

> State is free to draw the districts pursuant to whatever criteria it deems appropriate so long as the effect is not racially discriminatory and so long as racially discriminatory purpose is absent from the process. Act No. 5 is being denied Section 5 preclearance because State officials successfully implemented a scheme designed to minimize black voting strength to the extent possible; the plan drawing process was not free of racially discriminatory purpose. (J.S.A. 48-49)

Clearly, neither the District Court, the United States, nor the Intervenors ever sought to coerce the State to maximize the percentage of blacks in any district. The State was denied declaratory relief not because of what they failed to do, but because they intentionally drew the district line between the Fourth and Fifth Districts for the specific and sole purpose of splitting a cohesive black community in order to minimize the likelihood that a black could be elected to Congress from the

State of Georgia. Such purposeful discrimination is illegal under Section 5.

II.

IN THE ABSENCE OF ANY SHOWING BY THE STATE OF GEORGIA THAT ACT NO. 5 GAVE BLACKS EQUAL ACCESS TO THE POLITICAL PROCESS, THE STATE WAS NOT ENTITLED TO A DECLARATORY JUDGMENT UNDER THE "EFFECT TEST" OF SECTION 5, AS AMENDED IN 1982

In Beer v. United States, supra, this Court limited the effect test of Section 5 to cases of retrogression. In City of Mobile v. Bolden, supra, a plurality of this Court concluded that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, was limited to cases of intentional discrimination. When Congress extended and amended the Voting Rights Act in 1982, Congress changed the statutes for the specific purpose of overturning both of these decisions.

Section 2 was amended to make it clear that voting practices would be unlawful if they "resulted in" discrimination, regardless of purpose. S. Rep. No. 417, 97th Cong., 2nd Sess. 27-30 (1982) [hereinafter, "Senate Report"]; H. Rep. No. 227, 97th Cong., 1st Sess. 28-32 (1981) [hereinafter, "House Report"]. In determining whether a challenged electoral practice results in discrimination, Congress indicated a variety of evidentiary factors that could be considered by a court in determining whether blacks had equal access to the political process. Senate Report at 28-29; House Report at 30.

In amending Section 2 to encompass electoral practices that result in discrimination, regardless of purpose, Congress also intended to have the new Section 2 standard apply in Section 5 determinations. As the Senate expressly stated:

> In light of the amendment to Section 2, it is intended that a Section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2.
> (Senate Report at 12, n. 21.)

Thus, a reapportionment plan, or any other voting change, may not receive Section 5 approval where the State fails to prove that minority members in the jurisdiction would have equal access to the political process under the new law. Pre-clearance of the new law must be denied where the State fails to make this showing, even if there is no finding of intentional discrimination, and even where there is no retrogression.

The plaintiffs failed to provide any evidence that would entitle them to a declaratory judgment pre-clearing Act No. 5 under the expanded definition of "effect" in Section 5 that Congress adopted in 1982.

The district court did not rest its decision on this theory under the amended Voting Rights Act because the proof of purpose was so clear. This is an alternative basis upon which the district court's judgment should be affirmed.

Although Appellants assert that blacks have equal access to the political process under Act No. 5, they made no such showing at trial. Noting that the Senate and House Reports indicate that the historical presence of voting discrimination is relevant to determining whether blacks have full access to the political process, the State asserts that there have been no official barriers to voting by blacks since 1946. (J.S. 19) That is not true. In fact, elimination of the literacy test in 1965 resulted in increased voter registration in the Atlanta area that even exceeded, percentagewise, the increase in many rural areas in Georgia.

(Exhibit I.D. TTT; T. 155) The evidence is undisputed that, as recently as 1972, local election officials ignored Section 5 in erecting a variety of barriers to deter black voters and candidates from office; that polling locations were changed shortly before Andrew Young's congressional race in 1972; that voters were not notified of their new polling locations; and that election districts were redrawn in a thoroughly confusing fashion to make voting as difficult as possible for many black residents. (T. 675-77) The Fifth District itself was also intentionally gerrymandered during the last reapportionment, in 1971 and 1972, to make it difficult for blacks to be elected. (J.S.A. 7-8)

Plaintiffs also assert that a black could be elected in the Fifth Congressional District under Act No. 5, but the evidence is clearly to the contrary. Although one

black person has been elected to the Fifth Congressional District since Reconstruction, the evidence is uncontested that that would be extremely unlikely to reoccur under Act No. 5. As the district court found, members of the legislature believe that the district would have to have a 65% black population in order to provide black candidates with a reasonable possibility of winning. (J.S.A. 42-43). Racial block voting has been increasing in the Atlanta metropolitan area over the past ten years (J.S.A. 5), and the State's expert witness, Dr. Bullock, failed to present any credible evidence whatsoever that a black person could prevail under Act No. 5. Bullock's methodology substantially overpredicts the percentage of whites who vote for black candidates. (T. 271-80; Exhibits I.D. AAAA, BBBB)

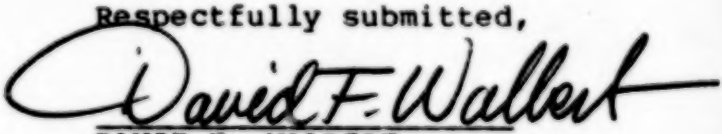
Because the State failed to present any evidence that blacks would enjoy equal

access to the political process under Act No. 5, they were not entitled to a declaratory judgment under Section 5 of the Voting Rights Act, as amended.

CONCLUSION

For the reasons stated above, Intervenor-Appellees respectfully request that this Court summarily affirm the judgment of the district court without the necessity of any further argument since no substantial question of any sort has been presented in Appellants' jurisdictional statement.

Respectfully submitted,



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